

ADDITIONAL COMMENTS BY LIBERAL SENATORS

1.1 Liberal Senators support the broad thrust of the majority report and recommendations, and strongly agree with the imperative of minimising the risk of sexual, physical and emotional harm to children by stringent screening of people who are seeking to work with them. Nonetheless, Liberal Senators note that a number of significant and respected organisations that gave evidence to this inquiry, including the Law Council of Australia, hold reservations about a number of aspects of the Bill. These reservations include: whether sufficient justification has been provided for over-riding important legal principles associated with quashed and pardoned convictions; a lack of a definitions of 'working with children'; and the adequacy of privacy safeguards.

1.2 Liberal Senators note evidence by the Attorney-General's Department that this Bill simply allows Commonwealth spent, quashed and pardoned convictions to be provided to other jurisdictions.¹ The Departmental representative stated that:

I think there has been some misunderstanding that this sets up a sort of national scheme for the Commonwealth controlling all checks to do with working with children. All this bill does is remove Commonwealth legislative barriers to the provision of some categories of Commonwealth conviction information. It does not regulate any state or territory conviction information.²

1.3 This evidence, which apparently seeks to reassure the committee that there is nothing controversial about this Bill, is in stark contrast with the evidence of the Law Council of Australia, the Office of the Privacy Commissioner, and the Queensland Council for Civil Liberties. Either these organisations have indeed misunderstood the Bill, or else the Department is underestimating or understating its significance.

1.4 There is no indication in the Explanatory Memorandum or the second reading speech that this is a routine Bill building on an existing regime. Indeed, unless a reader of the Explanatory Memorandum was wholly familiar with the checking system in the state jurisdictions in respect of people who seek to work with children, the wording of the introduction to the Explanatory Memorandum would clearly lead the reader to assume that what was proposed was wholly new:

The amendments would create an exception for convictions of persons who work, or seek to work, with children so that those convictions can be disclosed to and taken into account by Commonwealth, State and Territory screening agencies in determining whether the person is suitable to work with children.

1 Ms Sarah Chidgey, Committee Hansard, 10 November 2009, pp 17-18.

2 Ms Sarah Chidgey, *Committee Hansard*, p. 23.

1.5 This text can clearly be read as a new power for such screening agencies, and as such, the Explanatory Memorandum is inadequate and potentially misleading.

1.6 The Department also advised the committee that 'a number of jurisdictions already take into account their own quashed and pardoned convictions'.³ As such, the concerns expressed by the Law Council and others remain valid, as by proposing the Bill, the Australian Government is effectively endorsing principles and practices that the Law Council has identified as problematic. For example, as quoted in the main report, where the Council told the committee that:

... several of the Bill's provisions potentially interfere with a person's right to rehabilitation, privacy and employment without any demonstrated justification.⁴

and

... if a person has been pardoned (on the basis of a wrongful conviction) or their conviction has been quashed or set aside by a higher court on review, they are entitled to the full benefit of that decision. That requires that the person be treated as if the conviction had never occurred. ...

Any different approach would mean that, once convicted, a person's guilt can never be fully expunged even where the process by which the conviction was secured is found to have been flawed.⁵

1.7 While not prepared to go as far as the Law Council and recommend that the exceptions proposed in the Bill not be passed, Liberal Senators express their disquiet about what the Law Council describes in the preceding paragraphs, which the Bill facilitates and extends.

1.8 Liberal Senators are to some extent reassured about the extent of the safeguards built into the Bill, and the assurances provided in evidence. However they are nonetheless strongly of the view that the Bill would be enhanced by a definition for 'working with children'. Liberal Senators acknowledge efforts to incorporate such a definition in the bill and the obstacles that have precluded this inclusion, but remain of the view that the lack of a clear definition is still a significant issue.

1.9 Liberal Senators note that the Department does not appear to consider that there will be a significant widening of classes of people being checked, as was apparent in the following exchange:

Senator FISHER—What if McDonald's seeks to employ someone behind the counter? After all, a child may want to go to the loo and ask a member of McDonald's staff for assistance.

Ms Chidgey—The difficulty with that is that it is just not relevant to this bill, in the sense that whether anyone currently needs a check will not be

3 Ms Sarah Chidgey, Committee Hansard, 10 November 2009, pp 17-18.

4 *Submission 15*, p. 1.

5 *Submission 15*, p. 2.

changed by this bill. The requirements for a check are currently set in state and territory legislation, and they will continue.⁶

1.10 While understanding the point made by the departmental representative, Liberal Senators remain of the view that a clear and consistent definition across jurisdictions would be beneficial and would reduce the potential for a larger group of people to be affected by the legislation than is intended.

Recommendation 1

1.11 Liberal Senators recommend that the Australian Government and the States and Territories, through the SCAG processes, work towards adopting a consistent definition of 'working with children' across all jurisdictions.

1.12 Liberal Senators also support the heightened privacy safeguards suggested by the Office of the Privacy Commissioner, and the suggestion in the main report that these be used as a yardstick to determine whether screening units are adequately complying suggest considered by SCAG for implementation. Liberal Senators do not think the main report goes far enough however, and consider that this suggestion should have been given the force of a recommendation.

1.13 As noted above in paragraph 1.6, by proposing the Bill, the Australian Government is endorsing practices which are apparently already in place in most State jurisdictions. Liberal Senators do not accept that it is sufficient for the Australian Government to be leaving the enforcement of privacy principles entirely to what is already in place in the States. Liberal Senators point out that the use of quashed and pardoned convictions information when assessing a person's suitability to work with children, particularly when this is in relation to all convictions and not just those of obvious relevance, is a serious step with potentially far-reaching implications. Liberal Senators are of the view that the Australian Government should be taking a leadership role and ensuring that the privacy safeguards are stringent and uniform. As such, the recommendations of the Office of the Privacy Commissioner have much to recommend them, and should be used as the standard against which the operations of the screening units are assessed.

Recommendation 2

1.14 Liberal Senators recommend that the Government provide a more comprehensive and concise statement about the adequacy of privacy safeguards in screening units, and the standards to which these units will be required to adhere.

Senator Guy Barnett
Deputy Chair

Senator Mary Jo Fisher

⁶ Ms Chidgey, *Committee Hansard*, p. 23.

